

Concluding Observations

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CONCLUDING OBSERVATIONS

*Hurst Hannum**

Let me begin with a disclaimer, since it is evidently impossible to summarize or do justice to the many excellent presentations in the short time available to me. You have been fortunate to have had the benefit of an extraordinary wealth of expertise among the panelists, and I can only hope to offer a rather cursory overview and some disparate reflections on the various viewpoints presented.

The first thing one should recognize is that all those who spoke today believe that the Covenant on Civil and Political Rights (Covenant)¹ is a good thing and that U.S. ratification of the Covenant, despite its many flaws, is also a good thing. I suspect that there are some people in the United States, including members of the legal profession, who do not think that ratification was particularly positive. However, even those here who disagreed with one another, often seriously, on issues such as the necessary scope of reservations and non-self-execution, now agree that ratification was appropriate.

Nonetheless, there remains a range of differing opinions over the scope and potential impact of the Covenant. For example, I would take a much narrower view of the Covenant's substantive content than does Ann Fagan Ginger,² and I think that we may do a disservice to international law if we attempt to stretch it too far and suggest that it deals with every social and political issue that we would like to see addressed. But this is only one example of the kinds of useful debates in which we should be engaging, now that the Covenant has been ratified.

The great majority of the speakers focused on the question of implementation, and that is what I would like to spend most of my brief time discussing. Now that the Covenant has been ratified —

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1. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, entered into force for the United States Sept. 8, 1992) [hereinafter ICCPR].

2. Ann Fagan Ginger, *The Energizing Effect of Enforcing a Human Rights Treaty*, 42 DEPAUL L. REV. 1341 (1993).

with its reservations, declarations, understandings, and provisos — what do we do with it?

There are at least five areas or forums in which one might seek to implement the Covenant.

The first forum is the U.S. judiciary. As lawyers or law students, this is often where we look first, even though it should be the last place we look. Frankly, I think that the non-self-executing issue has been over-emphasized. At some stage, when the proper case is brought, a great brief may convince a court to ignore the Senate's declaration that the Covenant should be non-self-executing.³ But until we engage more systematically in the kind of exercise mentioned by Mike Posner,⁴ that is, educating judges about international law and international human rights law, we will continue to face extraordinary resistance in U.S. courts. It is understandably difficult for judges to accept as a rule of decision that will force them to decide a particular case in a particular way a body of law they have never heard of and that is, at best, uncertain if not downright murky.

In any event, courts have only rarely utilized international law as a rule of decision in the past. The cases cited by Jordan Paust just a couple of minutes ago⁵ demonstrate that courts have already referred to the Covenant numerous times in interpreting U.S. statutes or the Constitution. This approach — using the Covenant as an interpretative guide to influence domestic law — is likely to remain a much more effective way of using international law for the foreseeable future, and it does not depend on whether the Covenant is self-executing.⁶

Judges too often view international law arguments as make-weight or desperate measures which are employed only when all else

3. SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. NO. 23, 102d Cong., 2d Sess. (1992), reprinted in 31 I.L.M. 645 (1992); see Jordan J. Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257 (1993).

4. Michael H. Posner & Peter J. Spiro, *Adding Teeth to United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993*, 42 DEPAUL L. REV. 1209 (1993).

5. Paust, *supra* note 3, at 1274 (citing, among other cases, *United States v. Romano*, 706 F.2d 370 (2d Cir. 1983); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir 1980)).

6. Cf. Gordon Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3 (1983) (arguing for the use of human rights norms to aid in interpreting and applying constitutional limitations).

has failed. It therefore also would be helpful if lawyers would cite international law when they believe they are going to win a case, instead of citing it only when they think the cause is already lost.

With reference to the potentially negative impact of international law on U.S. judges, it might be appropriate here to offer some clarification to John Quigley's comments about the European case concerning the death penalty in Virginia,⁷ the *Soering* case.⁸ The European Court of Human Rights did *not* hold that the death penalty, as applied in Virginia, violated the prohibition against torture or inhuman or degrading treatment or punishment. What it did say was that, in the particular circumstances of the case (including Soering's youth, his diminished mental capacity, the length of time that he would spend on death row, and the availability of Germany as an alternative place of trial and imprisonment), there was a risk that he might be subjected in Virginia to treatment which would violate the European Convention. Therefore, the Court held that Britain should not extradite Soering. This is in some ways a minor lawyers' quibble, and, as advocates, it is appropriate to present any precedent we are using in the most favorable light. However, it can be counter-productive to suggest interpretations of the Covenant based on other international law authority that is not really on point. Indeed, the *Soering* case must have caused problems for David Stewart when he tried to explain to U.S. Senators why a European human rights court was intervening to protect a murderer who committed a crime in Virginia.⁹

The second obvious forum for implementing the Covenant is the legislative branch of government. The adoption of implementing legislation may not be necessary to address some of the relatively minor or technical reservations attached to the Covenant by the Senate. However, the Human Rights Conformity Act discussed by Mike Posner is a significant initiative, and it will force Congress to address at least a few difficult political issues raised by Covenant provisions.¹⁰ Similar conformity acts should be introduced at the state level as well, and human rights advocates should not discount

7. John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287 (1993).

8. *Soering v. United Kingdom*, 11 Eur. Ct. H.R. (ser. A) at 439 (1989).

9. Cf. David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations* 42 DEPAUL L. REV. 1183 (1993).

10. Posner & Spiro, *supra* note 4, at 1214-31.

the importance of even partial implementation of international norms by individual states.

In addition, as Frank Newman suggested,¹¹ I think we need to use the legislative process in another way. We need not only to seek the adoption of laws, but also to encourage the full participation of Congress in the process of governing, through its power to convene hearings and issue statements of policy. It is too often forgotten that there is, in fact, a human rights policy in this country, and that human rights are formally part of U.S. foreign policy, at least theoretically. This linkage is due to the U.S. Congress, not to Jimmy Carter, and certainly not to Henry Kissinger or Richard Nixon, who were in office when most of the earliest legislation was adopted. Even though some legislation may be almost impossible to enforce in the courts — because it expresses only the “sense of Congress” or leaves a great deal of discretion in the hands of the executive — it can have an extremely important political impact if discussed in the context of a Senate or House subcommittee hearing designed, for example, to determine whether China should be granted most-favored-nation status. So, when we consider the legislature as a forum for implementing the Covenant, we need to remember its investigative and political power, as well as its ability to make laws.

Although I did take Administrative Law from Professor Newman about twenty years ago, I don't remember any of it. Nevertheless, I do think that his emphasis on executive or administrative implementation of human rights standards is well placed. Indeed, this third forum for implementing the Covenant, the executive branch, is the one that is closest to most people. The executive branch includes not only the President and Secretary of State, but also all those people scattered around the country who decide the things that are of greatest importance to the majority of the population. This includes city administrators, police chiefs and prison wardens, and those who implement federal, state, and local social programs. One may be able to use the Covenant to persuade those who interpret and administer laws to do so in a manner that is consistent with more progressive international standards.

This brings me to the fourth and, in some ways, the most important forum, alluded to by Ann Fagan Ginger: education and public-

11. Frank C. Newman, *United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures*, 42 DEPAUL L. REV. 1241 (1993).

ity within the United States.¹² As Ms. Ginger said, the Covenant could have an energizing effect on people in this country. Until now, "international" human rights has not meant very much domestically, since it was rarely directly applicable and most often was used as a weapon in debates over foreign policy. Suddenly, the United States has become a party to a real treaty called the Covenant on Civil and Political Rights, about which few people know anything. It is essential that groups like the American Enterprise Institute, the Chamber of Commerce, and other mainstream groups, in addition to those already mentioned today, also participate in contributing to the process of U.S. reporting under the Covenant. Just as the existence of the annual country reports on human rights has forced every U.S. embassy around the world to focus on the human rights conditions in their country, so, too, will the reporting requirements under Article 40 of the Covenant force almost every branch of the U.S. government to focus on international human rights, whether it wants to or not.

The Covenant can also be a useful tool in terms of education and publicity about human rights in general. We obviously need to disseminate more information about the Covenant in our schools. The French, for instance, introduce the Universal Declaration of Human Rights in primary schools by stages. In the third grade, a child might learn about the freedom of speech and free expression. In the fourth grade, the child might learn about the right to life and other rights. We have a long way to go before we reach this level of awareness in the United States, although we have made some headway in that regard. Information on public education and international human rights is available from sources as diverse as the United Nations, UNESCO, Amnesty International, and Columbia University, and use of such resources should be bolstered by ratification of the Covenant.

The fifth and final forum for implementing the Covenant is what might be called the forum of foreign policy or international affairs, which includes at least two different aspects. First is the very significant fact that the United States has opened itself, at least minimally, to international scrutiny based on agreed international norms. This scrutiny will focus primarily on the initial report that the United States will file with the Human Rights Committee in

12. See Ginger, *supra* note 2, at 1361-62.

September 1993 and on subsequent periodic reports. It can be anticipated that U.S. NGOs as well as the Human Rights Committee itself will use the vehicle of discussing the U.S. report to pose hard questions about full U.S. compliance with the Covenant's norms.

Second, the Covenant also should play a significant role in guiding U.S. nongovernmental organizations and the U.S. government in identifying those "internationally recognized human rights"¹³ which are supposed to guide U.S. foreign policy. The United States has much more credibility when it criticizes other countries for violating the Covenant's standards now that we have accepted them as well. The United States also has an obligation to respond to foreign countries that will criticize us on issues such as the execution of juvenile offenders.

This Symposium did not address in detail the question of future priorities now that the Covenant has been ratified. One suggestion made by several speakers is early ratification of the Covenant on Economic, Social and Cultural Rights.¹⁴ This is clearly essential, as it is the area in which U.S. policy is most problematic in terms of its compliance with international norms.

It was suggested by some that we should adopt a very hard line and not agree to ratification of any other human rights treaties until the Economic and Social Covenant goes forward. I think this would be a mistake. Indeed, ratifying every human rights treaty *except* the Economic Covenant might be the best way of increasing the pressure to ratify what is regrettably seen by many conservatives in the United States as an inappropriate assertion of economic "rights." However, I do think that, in talking about the Civil and Political Covenant, it is fair to keep reminding people that the Civil and Political Covenant is only half of the International Bill of Human Rights. In fact, given the state of this country, many people may be much more interested in full implementation of the Covenant on Economic, Social and Cultural Rights than they are in achieving full implementation of the Covenant on Civil and Political Rights.

A second priority is to influence the human rights policy of the new Clinton Administration, particularly during the next six months. It perhaps is significant that, although most of the assistant secretary positions in the State Department have been filled, neither

13. 22 U.S.C. § 2304(a)(1) (1988).

14. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (1967) (entered into force Jan. 3, 1976).

the Assistant Secretary for Human Rights nor the Assistant Secretary for International Organizations has been appointed.¹⁵ Unfortunately, it has already been decided to change the name of the Bureau of Human Rights and Humanitarian Affairs to the Bureau of Democracy, Human Rights, and Labor. Similarly, the former Subcommittee on Human Rights of the House Foreign Relations Committee has become the Subcommittee on International Security, Human Rights, and International Organizations.

Such actions suggest that the new Administration does not understand international human rights very well. When you have a president who is elected on the motto "It's the economy, stupid!," that is not surprising, and perhaps his priorities are correct. But it is important for those knowledgeable about and interested in international human rights to make sure that the Clinton Administration does not think it is inventing the wheel, that it does not think that by renaming a bureau in the Department of State it is somehow redefining human rights.

The United States has now ratified several major human rights treaties, and it is important to keep focusing on the *international* aspect of human rights. Democracy is part of human rights; labor is part of human rights. However, a "flavor-of-the-month" approach under which each incoming administration might decide that it wants to focus only on one or two rights is not only unclear but disturbing. Much more attention needs to be paid to the Clinton Administration's early decisions in this area, before inappropriate precedents are set.

Underlying all our discussions today, in both the philosophical and political sense, is the question raised by Professor Bassiouni¹⁶ and others: Is the United States willing to change its policy based on what the rest of the world thinks, or is it still isolated? Does the U.S. government believe that American constitutional rights and civil rights laws are the only model for the rest of the world and that we have nothing to learn? Do U.S. civil liberties organizations believe, for example, that the First Amendment as currently interpreted is the only way to protect freedom of expression?

15. John Shattuck, former Vice President of Harvard University, member of the Board of Directors of Amnesty International-USA, and Director of the Washington, D.C. office of the ACLU, was nominated as Assistant Secretary of State for Human Rights in March 1993.

16. M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DEPAUL L. REV. 1169 (1993).

The fact that it is a struggle to ratify any human rights treaty submitted to the Senate reflects the broader rejection of international law that has occurred at least during the last twelve years. It is reflected in the current attitude, and certainly in the past attitude, of the United States toward the United Nations, in terms of both political and financial support. Until the United States is willing to accept that it has obligations to the rest of the world that may be determined by the rest of the world, and not solely by the United States, I fear that our ratification of the Covenant on Civil and Political Rights will remain, in many ways, a rather hollow exercise.

Not wishing to end on that pessimistic note, let me conclude by reiterating that ratification of the Covenant clearly is a step in the right direction. While it may be true that, as Ann Fagan Ginger told us, the people make the law, and the lawyers only write it down, lawyers are also people. Lawyers do have influence, for better or worse, and we do much more than write down the laws. We also make them.

But law is only one among many political tools, and we cannot find everything that we need in the Covenant on Civil and Political Rights. We need to use it where it is useful, and we need to know enough to disregard it when it is not useful or when it does not help to change government behavior in a positive direction. That is what human rights is all about. While the Covenant is an important step in this country, it certainly is not the only one we need to take.